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IN THE
COURT OF APPEALS OF INDIANA

PATRICK BRUGGEMAN,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 02A04-0509-CV-562
	)	
JAMES SIMON, JAMES SIMON FAMILY TRUST, JAS PARTNERS, and FORT WAYNE TELSAT, INC.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel Heath, Judge
Cause No. 02D01-9801-CP-183

September 8, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Patrick Bruggeman (Bruggeman) appeals the trial court's grant of motion for summary judgment in favor of James Simon (Simon), James Simon Family Trust and Fort Wayne Telsat, Inc. (Trust).

We affirm.

ISSUE

Whether the trial court erred when it granted the summary judgment motion of James Simon, James Simon Family Trust and Fort Wayne Telsat, Inc.

FACTS

Simon and Bruggeman owned shares in Fresno Telsat, Inc. (FTI). On June 7, 1996, Simon executed a non-negotiable note whereby he agreed to pay $1,855,000.00 for Bruggeman's FTI stock on or before August 1, 1997. The stocks were transferred to Simon; however, Simon did not pay the note when it became due.

On January 28, 1998, Bruggeman filed an action against Simon for non-payment of the promissory note, under cause number CP-183.[1] On April 13, 1999, during the taking of depositions in cause number CP-183, Simon informed Bruggeman that his assets were transferred to a family trust; the parties reached a verbal settlement agreement.

While the action under cause number CP–183 was still pending, on December 29, 2000, Bruggeman filed a second complaint, under cause number CP–2133, alleging a claim

of fraudulent transfer based upon Simon's transfer of assets to the Trust. On May 30, 2001, the two pending actions were consolidated by the trial court.

In December 1999, Simon had filed a motion to enforce the oral settlement agreement that had been reached on April 13, 1999. On May 4, 2000, after having conducted discovery including the taking of deposition, Bruggeman filed a motion in opposition to Simon's motion to enforce the settlement agreement. On May 5, 2000, Simon withdrew his motion to enforce the settlement agreement.

On August 27, 2002, the trial court conducted a bench trial on Bruggeman's complaint for non-payment of the promissory note under cause number CP-183. On November 14, 2002, the trial court entered judgment in favor of Bruggeman in the amount of $2,765,965.89, plus attorney fees and costs.

Simon then challenged Bruggeman's complaint for fraudulent conveyance under cause number CP-2133 by filing a motion for summary judgment with designated evidence and memorandum in support on August 5, 2002. Bruggeman filed a memorandum in opposition with designated evidence on April 4, 2005. On April 15, 2005, the trial court conducted a hearing on Simon's motion for summary judgment and took the matter under advisement. On August 11, 2005, the trial court granted Simon's motion for summary judgment, finding that the statute of limitations had run on Bruggeman's complaint for fraudulent conveyance. In its order, the trial court "concluded that this is not a proper case for the application of the doctrine of judicial estoppel." (App. 35).

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[1] A copy of the complaint was not included in this record.

Bruggeman appeals the trial court's grant of summary judgment resulting in the dismissal of his complaint for fraudulent conveyance.

DECISION

In reviewing a grant of summary judgment, we use the same standard as the trial court. Richards v. Goerg Boat & Motors, Inc., 384 N.E.2d 1084 (Ind. Ct. App. 1979). Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Ind. R. Civ. P. 56(C). The burden is on the moving party to show that there are no genuine issues of material fact and that movant is entitled to judgment as a matter of law. Once the movant has sustained its burden, the non-movant has the burden of setting forth specific designated evidence showing the existence of a genuine issue of material fact. Stephenson v. Ledbetter, 596 N.E.2d 1369, 1363 (Ind. Ct. App. 1994).

The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. Harris v. Traini, 759 N.E.2d 215, 220 (Ind. Ct. App. 2001). The record must be carefully reviewed to ensure that parties are not improperly denied a day in court. Lutz v. Fortune, 758 N.E.2d 77, 81 (Ind. Ct. App. 2001).

Indiana Trial Rule 56(C) provides in part, "A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto." The trial court may consider only properly designated evidence that would be admissible at trial. Hays v. Harmon, 809 N.E.2d

460, 464 (Ind. Ct. App. 2004). Our review of a summary judgment motion is limited to those materials specifically designated to the trial court. Rice v. Hulsey, 829 N.E.2d 87, 89 (Ind. Ct. App. 2005). All facts and reasonable inferences drawn from those facts are construed in favor of the nonmovant. Rice v. Hulsey, 829 N.E.2d 87, 89 (Ind. Ct. App. 2005).

Bruggeman designated to the trial court three items: (1) a portion of Simon's April 27, 2000 deposition, which contained Simon's averments as to the value of his assets transferred to the Trust; (2) a portion of Bruggeman's April 24, 2000 deposition, wherein Bruggeman averred that on April 13, 1999, he and Simon came to a verbal settlement agreement and that Simon told him that he had transferred many of his assets to a trust; and (3), two pages of transcript from the bench trial, which contained a portion of the direct testimony of Bruggeman's identification of the promissory note and Simon's failure to pay the note.

On appeal, Bruggeman argues that the trial court erred when it granted Simon's motion for summary judgment because genuine issue of material fact exists as to whether the statute of limitations was tolled under the doctrines of judicial and/or equitable estoppel.

The elements of fraudulent conveyance are found in the Uniform Fraudulent Transfer Act, Indiana Code §§ 32-18-2-1 through 32-18-2-21. The Uniform Fraudulent Transfer Act lists two types of fraudulent transfers:

(1)

A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

> (1) with actual intent to hinder, delay or defraud any creditor of the debtor; or
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (B) intended to incur or believed or reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as the debts became due.

Ind. Code § 32-18-2-14, and,

(2)

> A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:
> (1) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and
> (2) the debtor:
> (A) was insolvent at that time; or
> (B) became insolvent as a result of the transfer or obligation.

I.C. § 32-18-2-15.

Bruggeman's complaint fails to identify which type of fraudulent transfer Simon is alleged to have committed. In his complaint, Bruggeman simply alleges that "substantially all of the assets of James Simon and Denise Simon were transferred . . . for no consideration"; at the time of the transfer, Simon was indebted to Bruggeman; that the transfers of Simon's assets was done "with an actual intent to hinder, delay and defraud". . .; and "Simon became so divested of property that he was unable to pay Bruggeman, . . . and

still is, unable to pay such indebtedness." (App. 38). Bruggeman assert facts in his complaint that would support elements of both types of fraudulent transfer. Although we are unsure which provision of the statute Bruggeman sought relief under, the statute of limitations for both actions is as follows:

> A cause of action with respect to a fraudulent transfer or obligation under this chapter is extinguished unless brought as follows:
> (1) If brought under section 14(1) [32-18-2-14(1)] of this chapter, an action is extinguished unless brought not later than the later of the following:
> (A) Four (4) years after the transfer was made or the obligation was incurred.
> (B) One (1) year after the transfer or obligation was or could reasonably have been discovered by the claimant.
> (2) If brought under section 14(2) or 15(1) [Ind. Code 32-18-2-14(2) or Ind. Code 32-18-2-15(1)] of this chapter, an action is extinguished unless it is brought not later than four (4) years after the transfer was made or the obligation was incurred.

I.C. § 32-18-2-19 (emphasis added). In order to have met either provision of the applicable statute of limitations, Bruggeman had to have filed his complaint within either four years of the transfer of the assets or within one year after reasonably discovering the transfer; or have filed with the trial court specifically designated evidence that would excuse his delay.

The record is clear that Simon's transfer of assets to the Trust had been completed on or before April 22, 1996, and Bruggeman acknowledged that he became aware of the transfer in April, 1999. However, Bruggeman did not file his complaint alleging fraudulent transfer until December 29, 2000, almost 20 months after he became aware of the transfer in April, 1999. Applying either of the two statutory deadlines, as found in Indiana Code section 32-18-2-19, it is clear that Bruggeman did not meet either the four-year statute of limitations or the one year period after being made aware of the transfer in April, 1999, before having to

file his complaint on/or before April 22, 2000. Bruggeman insists, however, that under the doctrines of judicial and equitable estoppel, the statute of limitations was tolled by Simon's conduct and he should not be charged with the delay.

1. Judicial Estoppel

Bruggeman argues that, "Simon made improper use of the judicial system by taking the position that there was an enforceable settlement and seeking to enforce that settlement until such time as the statute of limitations had run on any claim to set aside the fraudulent conveyance to the Simon Family Trust." (Bruggeman's Br. 10). Bruggeman asserts that Simon's misconduct consists of Simon filing a motion to enforce the oral settlement agreement and then waiting until the four year statute of limitations had expired before withdrawing the motion. He asserts that a genuine issue of material fact exists as to whether the doctrine of judicial estoppel applies to toll the statute of limitations. We disagree.

> This court has explained that
>
> > [j]udicial estoppel is a judicially created doctrine that seeks to prevent a litigant from asserting a position inconsistent with one asserted in the same or a previous proceeding. Judicial estoppel is not intended to eliminate all inconsistencies; rather, it is designed to prevent litigants from playing "fast and loose" with the courts. The primary purpose of judicial estoppel is not to protect litigants but to protect the integrity of the judiciary.
> >
> > The basic principle of judicial estoppel is that, absent a good explanation, a party should not be permitted to gain an advantage by litigating on one theory and then pursue an incompatible theory in subsequent litigation. Judicial estoppel only applies to intentional misrepresentation, so the dispositive issue supporting the application of judicial estoppel is the bad-faith intent of the litigant subject to estoppel.

Robson v. Texas Eastern Corp, 833 N.E.2d 461, 466 (Ind. Ct. App. 2005) (internal citations

omitted). Further, a party may properly plead alternative and contradictory theories, but judicial estoppel precludes a party from repudiating assertions in the party's own pleadings. PSI Energy, Inc. v. Roberts, 829 N.E.2d 943, 957 (Ind. 2005). Also, regarding judicial estoppel, our Supreme Court in Tobin v. McClellen explained that "allegations or admissions in pleadings in a former action or proceeding will ordinarily estop the party making them from denying their truth in a subsequent action or proceeding in which he is a party to the prejudice of his opponent where the usual elements of estoppel by conduct are present." 73 N.E.2d 679, 684 (Ind. 1947) (internal citations omitted). Tobin went on to hold that there "must have been a determination of the prior action, or, at least, the allegations or admissions must have been acted on by the court in which the pleadings were filed or by the parties claiming the estoppel." Id.

Bruggeman designated in support of his contention: portions of depositions of himself and Simon, and portions of the trial proceedings under cause number CP-183. That portion of Simon's deposition, taken April 27, 2000, addressed the possible value of Simon's assets that were transferred to the Trust; and, whether any distributions had been made to Simon from the Trust. In Bruggeman's deposition taken April 24, 2000, Bruggeman averred that on April 13, 1999, he and Simon came to a verbal settlement agreement. Bruggeman further averred that Simon told him that he had transferred much of his assets to a family trust. Finally, the two pages of transcript designated from the bench trial contained a portion of direct testimony by Bruggeman, wherein Bruggeman identified the promissory note and his testimony regarding Simon's failure to pay the note.

Bruggeman vehemently argues that when focusing upon the relationship between Simon and the judicial system, it is clear that judicial estoppel should apply in this case because Simon had previously filed a motion to enforce the settlement agreement on December 8, 1999, and later withdrew it in an effort to play "fast and loose" with the court. See Robson, 833 N.E.2d at 466. First, we are unable to find any evidence that would support Bruggeman's theory that Simon's withdrawal of the motion to enforce the settlement agreement was inconsistent with a prior position taken in this matter. Instead we only have Bruggeman's speculation as to why Simon withdrew his motion. As noted in FACTS, however, Simon filed a motion to withdraw enforcement of the settlement agreement on May 5, 2000, only after Bruggeman had filed his motion in opposition to enforcing the settlement agreement on May 4, 2000. Furthermore, the trial court did not conduct a hearing or make a determination regarding Simon's motion to enforce the oral settlement agreement before the motion was withdrawn. See Tobin, 73 N.E.2d at 684. Bruggeman has failed to designate any evidence that would support his assertion that Simon acted inconsistent with or changed his position in order to circumvent the running of the statute of limitations. Therefore, the facts and circumstances surrounding events herein do not establish that judicial estoppel exists, and we conclude that Bruggeman has failed to show that a genuine issue of material fact exists that would toll the statute of limitations in his favor.

2. Equitable Estoppel

Bruggeman next argues that the trial court erred in granting Simon's motion for summary judgment because a genuine issue of material fact exist as to whether the running of the statute of limitations was tolled under the doctrine of equitable estoppel.

The elements of equitable estoppel are

> (1) a representation or concealment of a material fact, (2) made by a person with knowledge of the fact and with the intention that the other party act upon it, (3) to a party ignorant of the fact, and (4) which induces the other party to rely or act upon it to his detriment. The reliance element has two prongs: (1) reliance in fact, and (2) right of reliance. In addition, estoppel exists only as between the same parties or those in legal privity with them.

American Family Mut. Ins. Co. v. Ginther, 803 N.E.2d 224, 234 (Ind. Ct. App. 2004).

Bruggeman argues specifically that "the conduct of Simon lulled Bruggeman into inaction with respect to pursuing his claim to set aside the fraudulent conveyance." Bruggeman's Br. 7. Bruggeman asserts that as of April 13, 1999, he believed that a binding oral settlement agreement had been reached between the parties, which he feels is supported by Simon's motion to enforce that agreement. Bruggeman further argues that Simon calculated the withdrawal of the motion to enforce the settlement agreement to coincide with the expiration of the statute of limitations for filing an action for fraudulent transfer. We cannot agree with Bruggeman's argument.

Again, we will review Bruggeman's specifically designated evidence. Additionally, the CCS reveals that Bruggeman was anything but a "lulled" litigant, as it shows many court filings by Bruggeman. Both Bruggeman and Simon were sophisticated parties who were represented by counsel and were involved in an arm's length transaction involving almost two million dollars. Finally, Bruggeman's argument that he relied on the verbal settlement

agreement made on April 13, 1999 to his detriment is disingenuous. After Simon had filed a motion to enforce the settlement agreement in December 1999, the record shows that over the next several months Bruggeman resisted all efforts to formalize the agreement. He filed a motion to continue the hearing set on the matter, requested leave to take depositions, and filed his own motion in opposition to enforcement of the oral settlement agreement on May 4, 2000. Therefore, his actions do not support his assertion that he detrimentally relied upon Simon's conduct, an essential element of equitable estoppel. See Clark v. Crowe, 778 N.E.2d 835, 840 (Ind. Ct. App. 2002). As a result, we find that Bruggeman's designated evidence fails to establish that a genuine issue of material fact exists that tolled the running of the statute of limitations. Bruggeman's filing of his complaint for fraudulent transfer on December 29, 2000 was untimely and, we conclude that the trial court did not err when it granted Simon's motion for summary judgment.

Judgment affirmed.

RILEY, J., and VAIDIK, J., concur.